No. 113.

Brief of Counsel for Appellant

IN THE

SUPREME COURT

Filed Nov. 8, 1897.

OF THE UNITED STATES.

OCTOBER TERM, A. D., 1897.

GEORGE W. HARRISON,
Appellant,
vs.
PEDRO PEREA, SURVIVING ADMINISTRATOR OF THE ESTATE OF JOSE L. PEREA, DECEASED,

Appellant's Assignments of Error, Brief and Argument.

WM. B. CHILDERS,
For Appellant.

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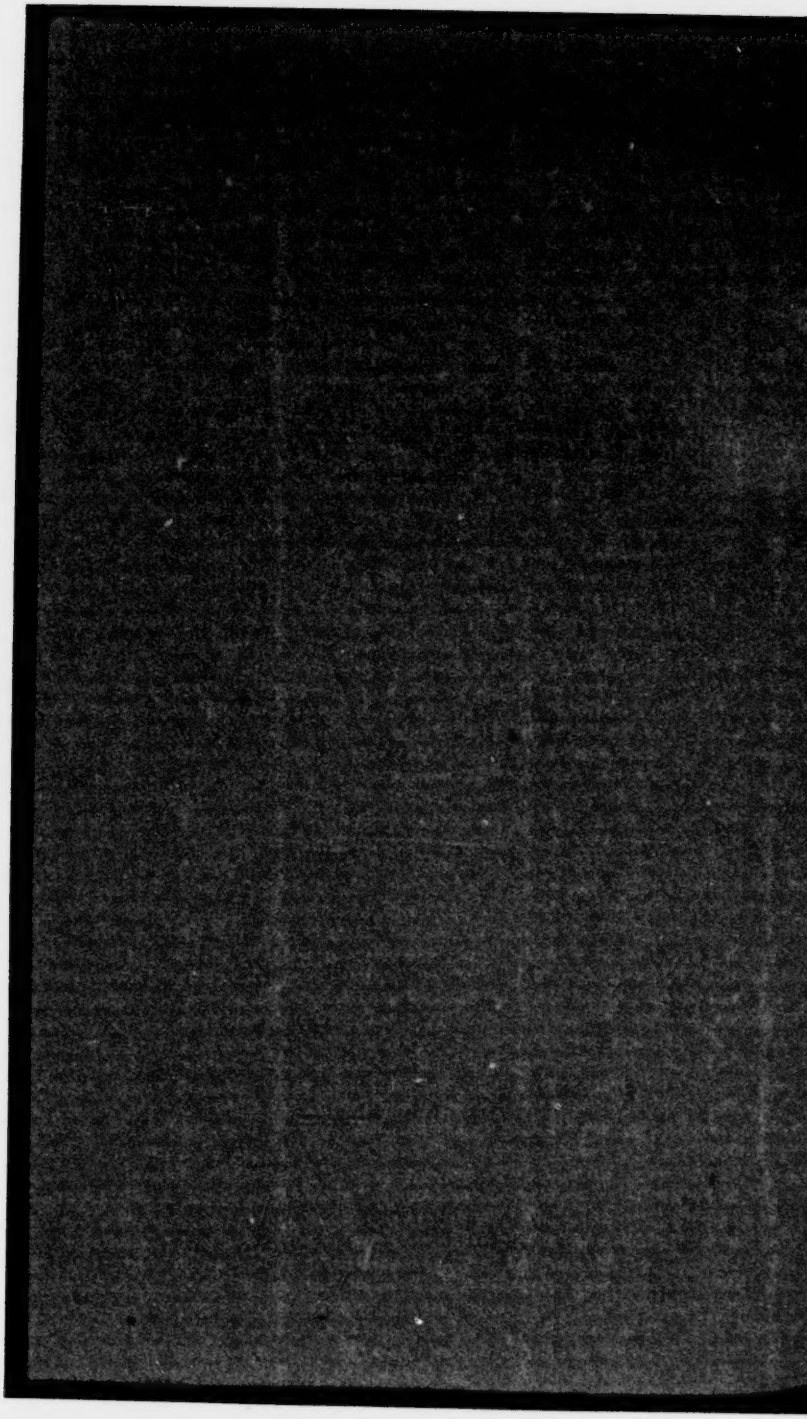

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ASSIGNMENT OF ERRORS.

Now comes the appellant and says that there is manifest error in the record, proceedings and decree of the Court below, whence this cause came into this Court, and for errors assigns the following:

First. The Court erred in affirming and not reversing the decree of the District Court for sustaining the exceptions for impertinence filed by the complainant to defendant's answer, as follows, to-wit:

(a.) The first exception being to that portion of the answer beginning with "and said defendant," on

line 23, page 2, down to line 13, inclusive on page 3, of the original answer filed in said cause—the portion of the answer to which said exception was sustained and which was stricken out being in words and figures as follows to-wit:

(Page 2.)

"And said defendant alleges that the property and
effects so turned over to the said Guadalupe Perea de Harri-
son as such guardian by said administrators and received by
her was but a small part of what the said minor Jose L. Perea
second, was entitled to have and receive from the said admin-
istrators on account of the estate of the said Jose Leandro
Perea, Sr., in their hands and there has never been any full
and complete settlement by said administrators of said estate,

(Page 3.)

or any legal settlement thereof whatever, and that upon a full
and complete and just settlement of said estate, the estate of
the said Jose L. Perea, Second, will be entitled to have and
receive from the said administrators of the estate of Jose
Leandro Perea, Sr., a very large amount of property and effects
far exceeding in value any interest which the said adminis-
trators, even if they are held to be heirs-at-law of the said
minor, can have in the estate of the said minor, and that the

said complainant, Pedro Perea, is liable and responsible to the
estate of the said minor, Jose L. Perea, Second, for any and all
of the interest of the said minor in the estate of the said
Jose Leandro Perea, Sr., which said complainant and his co-administrators have failed to account for."

(Transcript in this Court, folios 28 and 35.)

(b.) The second exception to that portion of said answer beginning with the words "and defendant," on line 23 of page 5, down to and including the word "debts," on line 29 of said page 5—the part of said answer to which said eexception was sustained and which was stricken out being as follows, to-wit:

(Page 5.)

"And defendant alleges that it was the duty
of the complainant and his co-administrators to have themselves collected such debts and divided the money between
the distributees of said estate after the same was collected,
and not to have attempted to assign a portion of uncollected debts to said minor and that said administrators are still
accountable for said debts."

(Transcript in this Court, folios 48 and 38.)

(c.) The third exception which was sustained to the words in lines ten and eleven of the original answer, as follows:

(Page 8.)

"And his co-administrators of the estate of Jose Leandro Perea, Sr., deceased," and which said words were stricken out. (Transcript in this Court, folios

48 and 40.)

(d.) The fourth exception to that portion of said answer beginning with the words "and said," in line 17 on page 9, down to and including line 2 on page 10, as follows:

(Page 9.)

"And said defendant further alleges that said complainant is accountable for the assets of the estate of Jose Leandro Perea, Sr., for which he has never accounted, and of which administration there has never been any valid final settlement, and in which said assets so unaccounted for the said Guadalupe Perea de Harrison, as widow of the said Jose Leandro Perea, deceased, and since her death, her child, the defendant Grover Williamm Harrison, and this defendant as her surviving husband had and have interest far exceeding in amount any interest said complainant can have in the estate of said Jose L. Perea, Second. And said defendant further answering alleges that although the said Guadalupe Perea de Harrison in her lifetime demanded that said complainant fully account for said assets, yet he failed and refused to do so, and she was compelled to bring suit, in this honorable Court against him,

(Page 10.)

for the same, which said suit is still pending therein, and will be hereafter more fully referred to."

and which said words were stricken out. (Tanscript in this Court, folios 48, 41 and 42.)

(e.) The fifth exception to that portion of said answer, beginning with the words "and said," on line 7 on page 11, down to and including the word "court" in line 26 on page 12 of the original answer, the part to which said exception was sustained and which was stricken out being as follows:

(Page 11.)

"And said defendant further al-
leges that upon a full and fair accounting by the said com-
plainant as to his liability to the estate of the said Jose L.
Perea, Second, for an account of assets in his hands as one of
the administrators of the estate of Jose Leandro Perea, Sr.,
deceased, for which neither he nor his said co-administrators
have ever accounted, the said complainant would be found
indebted to the estate of the said Jose L. Perea, Second, in a very
large sum of money, and in a very much larger sum than
any interest he has or can have as heir-at-law of the said
Jose L. Perea, Second, in the estate of the said Jose L. Perea, Sec-
ond, and defendant further alleges that the estate of the said
Jose L. Perea, Second, is not indebted in any sum whatever, and
that the estate of the said Jose Leandro Perea, Sr., is likewise
not indebted in any sum whatever, and that the time for filing

claims against both estates has long since passed, and all such claims are barred and all that is necessary to fully settle both of said estates is to ascertain upon an accounting what is due to each of the distributees and heirs-at-law of the said Jose Leandro Perea, Sr., and Jose L. Perea, Second, if any thing, and that a decree be rendered in favor of such distributees and heirs-at-law; and defendant further alleges that the complainant and the defendant to this bill are all of such heirs and distributees except Jesus M. Perea, one of the defendants named herein, who has died since the filing of this bill

(Page 12.)

and upon whose estate as defendant is informed and believes, there has as yet been no administration. And defendant further alleges that said complainant is not entitled to any decree against this defendant individually or as administrator of the estate of Guadalupe Perea de Harrison, because as hereinbefore alleged, he was indebted to the said Jose L. Perea, Second, at the time of his death, for a large amount of the assets of the estate of Jose Leandro Perea, Sr., deceased, the father of said Jose L. Perea, Second, and because as this defendant alleges, the said complainant was likewise indebted to

the said Gua-
dalupe Perea de Harrison, at the time of her death for the
assets of said estate of Jose Leandro Perea, Sr., the said
Guadalupe Perea de Harrison, having been the surviving widow
of the said Jose Leandro Perea, Sr., for which said assets
neither the said complainant nor his co-administrators
Jesus M. Perea and Mariano Perea have ever fully accounted
either to the said Jose L. Perea, Second, or the said Guadalupe
Perea de Harrison as his guardian or to the said Guadalupe
Perea de Harrison individually, and on account of which said
failure to account the said Guadalupe Perea de Harrison and
this defendant as her husband brought suit in this honorable
court on the 24th day of February, A. D., 1888, against the
complainant and his co-administrators, which said suit is en-
titled Guadalupe Perea de Harrison, et al., against Jesus M.
Perea, et al., and is still pending, being numbered 2610 upon
the docket of this court."

Second. The Court erred in affirming the action of the District Court sustaining complainant's demurrer to the defendant's cross-bill. Transcript in this Court, folios 49 to 88 inclusive. See opinion 233.

Third. The Court erred in not holding that the matters and things set up in defendant's cross-bill

were not germain to the matters sought to be litigated by the original bill and in not holding that complainant's demurrer thereto should have been overruled by the District Court. See opinion page 233.

Fourth. The Court erred in affirming the District Court in sustaining the Master's sixth and seventh findings of fact that the defendant or intestate should have invested or have left invested in sheep or bank stock the funds of the ward, when no order or other authority for so doing was shown. Folios 341-358.

Fifth. The Court should have held that the defendant's exception to the master's first finding of law was well taken. Said master's first finding of fact was as follows: "The powers of Guadalupe Perea de Harrison, as guardian of Jose L. Perea, Segundo, ceased immediately upon the death of said ward." Folios 120-341.

Sixth. The Court erred in not reversing the decrees of the District Court for overruling the appellant's exception to the master's second finding of law, which finding is is follows: "After her appointment as administratrix of the estate of Jose L. Perea, Segundo, Guadalupe Perea de Harrison held said estate as such administratrix and not as guardian of said deceased minor." Transcript, folios 120—Second exception to master's finding of law, folio 341; 14th assignment of error in court below, folio 358.

Seventh. The Court erred in not reversing the District Court for overruling the defendant's exception to the master's second finding of law, which is

as follows: "Section 1018 of the Compiled Laws of New Mexico, 1884, makes it the duty of a guardian to loan funds of the ward beyond what may be necessary for the support and maintenance of the ward, under the direction of the Probate Court; and section 1019 makes such guardian liable for interest if he fails to loan money of his ward as aforesaid." Transcript, folio 120. Third exception, folio 342; 15th assignment of error in the the Court below, folio 359.

Eighth. The Court erred in not reversing the District Court for overruling the defendant's exception to the master's fourth finding of law, which is as follows: "After the death of Guadalupe Perea de Harrison, Pedro Perea, the surviving administrator, was the only person entitled to the possession of the estate of said Jose L. Perea, Segundo, and G. W. Harrison, by retaining possession of said estate and refusing to deliver the same over to said administrator, became liable for the proper management and control thereof." Transcript, folio 121; fourth exception, folio 342; 16th assignment of error in the Court below, folio 359.

Ninth. The Court erred in not sustaining defendant's seventeenth assignment of error in the Court below to the effect that the master by his fifth finding of law erroneously charged up interest by striking balances more frequently than the law warrants, and that he charged too much interest for that reason upon the estate, and that the amount for that reason, which the master held complainant is entitled to receive, is in excess of the amount shown

by the evidence. Folios 121, 342 and 359.

Tenth. The Court erred in not sustaining defendant's 19th assignment of error to the effect that the District Court erred in overruling appellant's exception to said master's seventh finding of law, to the effect that said complainant was entitled as administrator of the estate of said Jose L. Perea, 2nd, to the statutory commission for receiving and paying out the whole balance decreed against the defendant, when as a matter of law, he is only entitled to receive commission upon funds and property actually received and disposed of by him. Master's VII finding of law, folio 122. Seventh exception, folio 342; 19th assignment of error in the court below, folio 360.

Eleventh. The Court erred in sustaining the Court below in overruling defendant's exception to the master's VIII finding of law, allowing the complainant statutory commission on the whole of said estate, none of which he had received and disbursed, while at the same time charging the defendant interest on the whole of the estate which he found to be in his hands. Folio 122; eighth exception, folio 343; 20th assignment of error, folio 360.

Twelfth. The Court erred in holding that the complainant was entitled to receive the statutory commission upon any part of said estate, none of which he had received or disbursed. Master's VIII finding of law; master's recommendation I, folio 123; eighth and ninth exceptions, folio 343; 21st assignment of error, folio 360.

Thirteenth. The Court erred in following the master's recommendation and decreeing that the de-

fendant pay over to the complainant as administrator of said deceased minor, nine twenty-sixths (9-26) of the balance of said estate found to be in his hands, when it clearly appeared that there had not been a full accounting between the defendant and said complainant, or between defendant's intestate as guardian of said minor, and said complainant as to said minor's estate and his interest in his deceased father's estate. I and II recommendations of the master, folio 123; 9th and 10th exceptions, folio 343; 21st and 22nd assignments of error, folios 360 and 361.

Fourteenth. The Court erred in finding by its VIII finding of fact that said assets were not held by the defendant's intestate Guadalupe Perea de Harrison as the administratrix of said deceased minor, when as a matter of law she held them after said guardian's death and letters of administration had been granted her not as guardian but as administratrix. Folio 372, page 229.

Fifteen. The Court erred in holding by its tenth finding that the refusal of the defendant to pay over the assets belonging to said deceased minor's estate which had been in his intestate's hands either as guardian or co-administrator of complainant to him without an accounting or other settlement of said estate, was wrongful as a matter of law.

Sixteenth. The Court erred in finding that the defendant was liable to the complainant for the value of solicitor's fees, at the time of the rendition of the decree therein, in the sum of three thousand five hundred and eighty-six dollars. Court's XI finding, folio 373.

Seventeenth. The Court erred in finding that the defendant George W. Harrison had in his possession and was liable to the complainant on the day of the rendition of the decree therein in the sum of thirty-five thousand eight hundred and sixty-nine dollars and seventy-seven cents, with interest thereon at six per cent. XII finding, folio 373.

Eighteenth. The Court erred in finding that the complainant was entitled to his full statutory commission on the whole of said last mentioned sum. XIV finding, folio 373.

Ninteenth. The Court erred in rendering a decree in this cause against the defendant in his individual capacity, when upon the facts, if he is liable at all, he is liable as administrator of the estate of Guadalupe P. Harrison, deceased. Folios 363 to 366.

Twentieth. The Court erred in making its V finding that the defendant immediately after his intermarriage with the said Guadalupe Perea de Harrison, took charge and control and mingled the same with his own funds, or did anything else with them other than as the agent of his wife; because there is no evidence whatever, upon which to predicate the finding as made by the Court. Folio 372.

Twenty-first. The Court erred in making its X finding that the said defendant after the death of his wife was in possession of the assets of the deceased minor in any other capacity than that of administrator of his wife's estate—the Court having already found that long before her death said funds had been commingled with her general estate. Folio 373.

Twenty-second. The Court erred in finding and

decreeing that defendant was liable as a trustee for funds in his hands, when neither the evidence nor the Court's findings identify or show any particular assets in his hands to have been assets of said minor's estate, and the bill itself was not brought for the purpose of impressing a trust on any particular property or assets or against the defendant as a constructive trustee and contains no allegations upon which such relief can be predicated. The only relief the bill warrants is an accounting against the estate of Guadalupe Perea de Harrison.

Twenty-third. The Court erred in making its XVI finding, which is not a finding of fact at all, but is founded upon a mistake of law, because defendant had a right to retain said assets as administrator of his deceased wife's estate until there had been some settlement in the Probate or other Court by accounting or other determination of the claim against his intestate's estate. Finding XVI, folio 374.

Twenty-fourth. The Court erred in decreeing in favor of the complainant a solicitor's fee of ten per cent. on the whole amount of the said estate as found by the Court.

Twenty-fifth. The Court erred in decreeing in favor of the complainant the full statutory commission allowed to administrators for the settlement of estates, upon the whole amount of said estate as found by it. Folios 364-5.

Twenty-sixth. The Court erred in rendering any final decree whatever in said cause, when it clearly appeared that there had not been any complete accounting and settlement of said estate, but should

have reversed and remanded the cause to the District Court in order that there might be such full and final settlement and accounting.

Wherefore, appellant prays that the decree of the Court below be set aside, reversed and held for naught.

WM. B. CHILDERS,
Solicitor for Appellant.

I acknowledge service of copy of above assignment of errors this 19th day of October, 1897.

NEILL B. FIELD,
Counsel for Appellee.

STATEMENT OF THE CASE.

The bill in this cause is for an accounting and settlement of the estate of Jose L. Perea, second, a minor, who dies on the 27th day of August, 1887, being about eight years old. The bill alleges that he dies leaving Guadalupe Perea de Harrison, his mother then in life; the complainant Pedro Perea and the defendants Jose L. Perea; Jesus M. Perea, Benicio F. Perea, Marina Perea, Jacobo Perea, Beatriz Perea de Armijo, Soledad Perea de Castillo, Josefa Perea de Castillo, Filomena Perea de Otero, Barbara Perea de Yrisarri and Cesaria Perea de Hubbell, and Grover William Harrison, his heirs at law; that is to say, his mother and thirteen brothers and sisters. It appears from the Master's report and from the first finding of fact by the Supreme Court of New Mexico, that Jose L. Perea, Sr., died about the 21st day of April, A. D., 1883 and left surviving him Guadalupe Perea

his widow, who afterwards intermarried with the defendant George W. Harrison, the deceased minor, Jose L. Perea, segundo, and his twelve half brothers and sisters; the said Jose segundo being the son of Jose L. Perea, Sr., and the said Guadalupe; and the said Grover William Harrison being the son of the said Guadalupe and the defendant George W. Harrison.

The bill of complaint also alleges that the said Jose L. Perea, second, died leaving his mother Guadalupe Perea de Harrison, the said Grover William Harrison and his twelve other half brothers and sisters, his heirs at law. Record folios 4 and 371; findings 1, 2 and 3 of the Master, Record folio 116.

The bill alleges and it is admitted that Guadalupe Perea de Harrison became the guardian of the property of the minor, Jose L. Perea, on the 23d day of July, 1884, and received property and effects on account of her said ward from the complainant, Pedro Perea, as administrator of the estate of his deceased father, Jose L. Perea, Sr., and his co-administrators Jesus M. Perea and Mariana Perea. But it was alleged by defendants that the amounts so received were only a part of what the said minor was entitled to receive. Complainant's bill, Record folio 4; defendant's answer, record folios 34 and 35.

The Court by its III finding of fact finds that the said guardian "became possessed of all the assets and property of the said Jose Leandro Perea which he inherited from his deceased father," but this finding is not supported by any evidence whatever. The Court by sustaining the exceptions to defendant's answer

and the demurrer to the cross bill, deprived the defendant of any opportunity to show that the said minor was entitled to any assets which had not been received by his guardian.

After the death of the said minor on September 5, 1887, both the complainant and Guadalupe Perea de Harrison applied to the Probate Court for letters of administration upon the estate of Jose L. Perea, 2nd, and the Court granted letters to both applicants jointly. Both qualified. Record folio 6.

On November 7th, 1887, the said Guadalupe filed a final report for the purpose of having her guardianship settled and getting a final discharge. (Record, folios 7, 17, 18, 19, 20, 21 22, 23, 24.) The report not having been acted upon the said guardian filed an amended and more detailed report, which differs very little from the other report in amount of property shown or otherwise, except that it shows receipts and disbursements in more detail, and also the specific kinds of property received (Record folios 8, 9, 19, 24) Upon the filing of this report in the Probate Court, the complainant appeared and objected to its approval and to the discharge of the guardian, because, as he alleged, the said report was incorrect and insufficient and specified ten items amounting as claimed to $3,443.00 and charged generally that she had not sufficiently charged herself with various items, including interest upon sheep and money, and that the guardian improperly credited herself with large amounts. (Record, folios 9-24 and 25.)

The bill alleges that said objections were sustained by the Probate Court and that the said guardian

took an appeal, giving bond therefor, which was duly approved by the Probate Judge, and that the Records in the Probate Court so show. That said appeal was taken and granted at the March term, 1888, of said Probate Court, and was returnable to the May term of the District Court for Bernalillo County.

The bill also alleges that said appeal was not docketed and was not prosecuted up to the 20th of October, 1889, at which time said Guadalupe Perea de Harrison died, and that at said time, said appeal had not been docketed or prosecuted. The bill was filed on the 3d day of April, 1890. (Record, folios 9-10.)

The answer admits the filing of said reports and alleges that the reports show that a part of the effects secured by the guardian were outstanding debts and promissory notes, which complainant and his co-administrators of the estate of Jose L. Perea, Sr., had pretended to turn over to said guardian on account of said minor, and that said debts were parts of debts due to the said Jose L. Perea, Sr., deceased, divided between the distributees of said estate, and for which said guardian received no evidence given by the debtor whatever, and the collection of which she could not enforce, or they were uncollectible; and that it was the duty of the complainant and his co-administrators to have collected such debts and distributed to the distributees the money collected.

The answer also admits that objections were filed to the report of the guardian by the complainant,

and that the second report was filed on account of said exceptions, and that upon the hearing the Probate Court arbitrarily refused to hear any evidence and denied that the appeal had been abandoned, and alleged that it had been docketed and was then pending in the District Court. (Record, folios 39 and 40.)

Upon the state of facts above alleged the complainant filed the bill in this cause.

So much of the minor's interest in his deceased father's estate as had been distributed to him by the complainant and his co-administrators of Jose L. Perea, Sr., had been received by Guadalupe Perea de Harrison as guardian of her minor child. Upon his death, his half brother, the complainant, and his mother both applied to the Court for letters of administration on the estate of the deceased. The Court granted letters to both applicants. Thereupon the guardian asked for a settlement of her guardianship, in order that the estate might pass into the hands of the administrators of the estate and insisted that she was entitled to have her accounts settled—instead of settling them and rendering a decree of some kind, the Court refused to consider her report, from which decision she appealed.

The appeal was not docketed or perfected until after the death of Guadalupe Perea de Harrison, the guardian. It was then filed on the 3d of April, 1890.

The bill was filed by the complainant against the thirteen half brothers and sisters of the deceased minor, and against Geo. W. Harrison, individually

and as administrator of his deceased wife, Guadalupe Perea de Harrison, and prayed for an accounting to the complainant, Pedro Perea, as surviving administrator of Guadalupe Perea de Harrison, deceased, for the property and assets of the estate of said minor *that remained in the hands of the deceased, Guadalupe Perea de Harrison, at the time of her death, and prayed* for a decree against the said defendant, G. W. Harrison, *upon such accounting both* individually and as administrator of *the said Guadalupe*, and that as *administrator he account for the value of all the estate of the said minor that came into her hands while guardian as aforesaid, and not remaining in her hands as guardian at the time of her death*, and that said Harrison, individually, and as administrator as aforesaid, account for all assets, rents, interest, &c., that have been collected or should have been collected by him as assets of said estate of said minor, since the death of the minor, and that said appeal from the Probate Court be decreed null and void, &c., and that said Harrison, *individually, and as administrator*, account to complainant, as surviving administrator as aforesaid, for the damage, waste and injury accruing and having been caused to the said minor's estate for the wrongful withholding of the same by said Harrison and his intestate. The bill further prayed for a final decree settling and distributing said estate, and that complainant be decreed his solicitor's fees against said Harrison, individually and as administrator in and about this suit, and for general relief. (Record folios, 14-16).

To this bill the defendant, individually, and as administrator of the said Guadalupe, answered in addition to the allegations already above set forth, de-

nying that the property received by the guardian was all the estate of the minor—that the property so received was received from the complainant, Pedro Perea, Mariana Perea, and Jesus Perea, then deceased, as administrators of the estate of Jose L. Perea, Sr., deceased—"and that the property and effects so turned over to the said Guadalupe Perea de Harrison, as such guardian, by said administrators and received by her was but a small part of what the said minor, Jose L. Perea, second, was entitled to have and receive from the said administrators on account of the estate of the said Jose Leandro Perea, Sr., in their hands, and that there has never been any full and complete settlement by said administrators of said estate, or any legal settlement thereof whatever, and that upon a full and complete and just settlement of said estate, the estate of the said Jose L. Perea, second, will be entitled to have and receive from the said administrators of the estate of Jose Leandro Perea, Sr., a very large amount of property and effects, far exceeding in value any interest which the said administrators, even if they are held to be heirs at law of the said minor, can have in the estate of the said minor, and that the said complainant, Pedro Perea, is liable and responsible to the estate of the said minor, Jose L. Perea, Second, for any and all of the interest of the said minor in the estate of the said Jose Leandro Perea, Sr., which said complainant and his co-administrators have failed to account for."

The answer also alleged that a large part of the effects shown by his guardian's reports to have been

received by her, consisted of outstanding debts and promissory notes which said complainant and his co-administrators of the estate of Jose L. Perea, Sr., had pretended to turn over to said guardian on account of said minor, and that said debts were either uncollectible or were parts of debts due to the late Jose L. Perea, Sr., divided between the different distributees of said estate for which the guardian received no evidence whatever, given by the debtors, and the collection of which she could not enforce, and then the answer alleged: "And defendant alleges that it was the duty of complainant and his co-administrators to have themselves collected such debts and divided the money between its distributees of said estate after the same was collected, and not to have attempted to assign a portion of uncollectible debt to said minor, and that said administrators are still accountable for said debts."

The answer also alleged that defendant was not entitled to the possession of the estate in the hands of the guardian until the guardianship accounts were fully settled, and proceeded to allege that the complainant was accountable for the assets of the estate of Jose L. Perea, Sr. for which he had never accounted and of which administration there had never been any valid settlement, and in which assets so unaccounted for the said Guadalupe, deceased, as the widow of the said Jose L. Perea, deceased, and since her death her child, the defendant, Grover William Harrison, and the defendant, her surviving husband, had an interest far exceeding in amount any interest said complainant could have in the es-

tate of Jose L. Perea, Second, and then alleged: "And said defendant further answering alleges that although the said Guadalupe Perea de Harrison in her life time demanded that said complainant fully account for said assets, yet he failed and refused to do so, and she was compelled to bring suit in this Honorable Court against him for the same, which said suit is still pending therein, and will be hereafter more fully referred to."

The answer also alleged: "And said defendant further alleges that upon a full and fair accounting by the said complainant as to his liability to the estate of the said Jose L. Perea, Second, for an account of assets in his hands as one of the administrators of the estate of Jose Leandro Perea, Sr., deceased, for which neither he nor his co-administrators have ever accounted, the said complainant would be found indebted to the estate of the said Jose L. Perea, Second, in a very large sum of money, and in a very much larger sum than any interest he has or can have as heir at law of the said Jose L. Perea, Second, in the estate of Jose L. Perea, Second, and defendant further alleges that the estate of the said Jose L. Perea, Second, is not indebted in any sum whatever, and that the estate of the said Jose Leandro Perea, Sr., is likewise not indebted in any sum whatever, and that the time for filing claims against both estates has long since passed, and all such claims are barred and all that is necessary to fully settle both of said estates is to ascertain upon an accounting what is due to each of the distributees and heirs-at-law of the said Jose Leandro Perea, Sr., and Jose L.

Perea, Second, if anything, and that a decree be rendered in favor of such distributees and heirs-at-law; and defendant further alleges that the complainant and the defendants to this bill are all of such heirs and distributees, except Jesus M. Perea, one of the defendants named herein, who has died since the filing of this bill, and upon whose estate, as defendant is informed and believes, there has as yet been no administration. And defendant further alleges that said complainant is not entitled to any decree against this defendant individually or as administrator of the estate of Guadalupe Perea de Harrison, because as hereinbefore alleged, he was indebted to the said Jose L. Perea, Second, at the time of his death, for a large amount of the assets of the estate of Jose Leandro Perea, Sr., deceased, the father of said Jose L. Perea, Second, and because as this defendant alleges, the said complainant was likewise indebted to the said Guadalupe Perea de Harrison, at the time of her death, for the assets of said estate of Jose Leandro Perea, Sr., for which said assets neither the said complainant nor his co-administrators, Jesus M. Perea and Mariana Perea have ever fully accounted to either of the said Jose L. Perea, Second, or the said Guadalupe Perea de Harrison, as his guardian or to the said Guadalupe Perea de Harrison individually, and on account of which said failure to account the said Guadalupe Perea de Harrison and this defendant as her husband brought suit in this Honorable Court on the 24th day of February, A. D., 1888, against the said complainant and his co-administrators, which said

suit is entitled Guadalupe Perea de Harrison, et al., against Jesus M. Perea, et al., and is still pending, being number 2610 upon the docket of this Court."

To the four allegations last above quoted from the answer the complainant filed exceptions for impertinence, which the District Court sustained, and this ruling was affirmed by the Supreme Court of the territory, and is assigned here as error. See first assignment of error.

These allegations are in substance that the complainant, the defendant Mariano Perea, and Jesus M. Perea, deceased, were administrators of the estate of Jose L. Perea, Sr., and as such delivered to Guadalupe Perea de Harrison the property and effects, which she held as guardian of Jose L. Perea, Second, which was but a small part of what said minor's interest in his father's estate amounted to, and that for the balance the said administrators of his father's estate were accountable, and should be held to account in this suit. That after the death of the said minor said balance was coming to the said Guadalupe and the other heirs-at-law of the said minor; that said Guadalupe had coming to her as the widow of Jose L. Perea, Sr., a large amount of property for which said administrators had not accounted; that ever since the death of the said Guadalupe, the interest coming to her through the said minor Jose L. Perea, Second, and to herself, as widow of her deceased husband had passed to the defendant, G. W. Harrison as her surviving husband, and their child, the defendant, Grover William Harrison; and that said estate of Jose L. Perea,

Sr., had never been finally settled, and that both of said estates could be settled in this suit, etc.; and also that the complainant and his co-administrators have never fully accounted to the said Jose L. Perea, Second, or the said Guadalupe as his guardian, or to the said Guadalupe individually for the assets of the estate of Jose L. Perea, Sr., and on account of their failure to account, the said Guadalupe and her husband, the defendant Harrison, brought suit in the District Court for Bernalillo County on the 24th day of February, 1888, against the said complainant and his co-administrators, giving the title and the docket number of said suit. To all these allegations the Court sustained the exceptions for impertinence. (Record, folios 38-40-41-43-45-87.)

The Court, by sustaining these exceptions, held that although this was a bill praying for a full and final settlement of the estate of Jose L. Perea, Second yet no accounting could be had of assets in the hands of complainant and his co-administrators of Jose L. Perea, Sr., in which said deceased minor was interested as heir and distributee, and for which this complainant was responsible.

Defendant also by leave of the Court filed a cross-bill setting up more fully and in detail the claims of the said minor and Guadalupe Perea de Harrison deceased, against the complainant and his co-administrators on account of the estate of Jose L. Perea, deceased. Said cross-bill after making proper allegations to parties and the succession of the defendant Harrison to the rights of Guadalupe, his deceased wife, and through her to an interest in the

estate of Jose L. Perea, Second, and bringing of a suit against said administrators, being the suit referred to in the answer. (Record, folio 45,) repeats the allegations contained in the original bill filed in said suit, and makes such allegations a part of the cross-bill. (Record, folio 52.) The cross-bill then prayed that said bill be taken and considered a part of the cross-bill and that defendant might have the relief therein prayed for. The bill originally exhibited against the complainant, his co-administrators and the other distributees as well as the cross-bill, prayed for an accounting as to the interest of both Jose L. Perea, Second, and Guadalupe Perea de Harrison in the estate of Jose L. Perea, Sr., and that the cross complainant received his interest therein coming to him through them. (Record, folios 78 to 83.)

To this cross-bill defendant demurred on the following grounds: that the matters alleged and as to which relief was prayed were in no wise connected with the subject matter of the original bill—that it was in effect consolidating two separate district suits in no wise connected with each other—and in which the parties were not the same, that the relief prayed for was against Pedro Perea and Mariano Perea as administrators of Jose L. Perea, deceased, and as such administrators they were not parties to the original bill, that the cross-bill was multifarious and without equity. (Record, folios 84 and 85.) A hearing and argument was had at the same time the exceptions to defendants answer were argued, and both were taken under advisement.

Both parties as appellant believes—certainly the

appellant—understood that the demurrer was sustained at the same time the exceptions were. It appears however, that no order was ever entered sustaining the demurrer, but it has ever since been treated as sustained by the Court. (Record, folio 87.) On the next day after the exceptions were sustained, as shown by the record, the complainant filed his replication to defendants' answer. (Record, folio 88.) A guardian ad litem was appointed for the infant defendant who answered for him. (Record, folios 90-91.) The case from then on is treated as having been referred to Karl A. Snyder, as special master, but no order is on record showing that it was referred to special master. Said special master proceeds to hear evidence and to make his report.

Both parties appeared before said Snyder, as master, and introduced their proofs on the issues as made up, or supposed to be made up.

Said Snyder, as master, made his report, to which both sides filed exceptions. (For defendant's exceptions see Record, folio 340.) The master's findings of fact and law were open to many objections, as defendant thinks. His reception of evidence and findings were, of course, in line with the Court's ruling on the exceptions to defendant's answer, and the demurrer to defendant's cross-bill. It was useless for defendant to offer evidence of the allegations stricken out of defendant's answer on the exceptions of complainant, or of the allegations in the cross-bill.

POINTS AND AUTHORITIES.

I.

The Court should not have sustained the exceptions to defendant's answer. The allegations excepted to were not impertinent, and if true, there could be no full and final settlement and distribution of the estate of the deceased minor, without taking into account all his property. These allegations alleged that the complainant had property in his hands, and as one of the administrators of his father's estate, was responsible to said minor for assets of said estate which had not been accounted for by said administrators.

A favorite ground of equity jurisdiction is the prevention of a multiplicity of suits. If one of the distributees of the estate of Jose L. Perea—for example, the defendant, Grover William Harrison—had filed an original bill against the complainant and the defendant, G. W. Harrison, as administrator of Guadalupe Harrison, deceased, alleging that she and complainant were co-administrators of the estate of Jose L. Perea, 2nd., &c., as in the original bill filed by complainant, and in addition thereto that the deceased, Jose L. Perea, 2nd., had not received by his guardian, or otherwise, all his interest in his father's estate, and that for the balance the complainant and his co-administrators of that estate were accounta-

ble. Such a bill would not be held multifarious or open to demmurrer. There can not be a final settlement of an estate unless all the assets are accounted for. If this is true it is clear that the Court erred in sustaining the exceptions to so much of complainant's exceptions as alleged, that complainant was responsible for assets of the estate of Jose L. Perea, 2nd., which had never been accounted for by the administrators of Jose L. Perea, Sr., and that there had been no final settlement of that estate.

If such an original bill would not have been multifarious, then these allegations were proper in an answer to the original bill for an accounting, and also in a cross-bill praying for relief.

Would such a bill be multifarious, and what are the principles applicable to that and the allegations in defendant's answer and also in the cross-bill?

Chancellor Walworth in Newland vs. Rogers, 3 Barbour's, Ch. 434, on this subject, said:

"The appellant's counsel is wrong, however, in supposing that two distinct and independent matters or claims, by the same complainant against the same defendant, cannot properly be united in one bill. Multifariouness, properly speaking, is where different matters having no connection with each other, are joined in a bill against several defendants, a part of whom have no interest in, or connection with some of the distinct matters for which the suit is brought; so that such defendants are put to the unnecessary trouble and expense of answering and litigating matters stated in the bill, in which they are not interested, and with which they have no connection. But a simple misjoinder of different causes of complaint, between the same parties which causes cannot conveniently and properly be litigated

together, is sometimes called multifariousness; though the ground of objection in such cases depends upon an entirely different principle; and is a mere question of convenience in the administration of justice. In cases of strict multifariousness the objection to the form of the bill is based upon the evident impropriety of compelling a part of the defendants to answer and litigate matters in which they are not interested, and which are not so connected with matters in which they are interested, as to render it proper, for the convenient administration of justice, to litigate and dispose of the whole in one suit. But the Court of Chancery abhors a useless multiplication of suits between the same parties, and endeavors to prevent it as far as practicable. For this reason the Court will not allow separate bills to be filed for different parts of the same account between the same parties; although the account relates to transactions which are not essentially connected with each other. (Purefoy vs. Purefoy, 1 Vern. Rep., 29.) Therefore, to sustain the objection that several distinct matters and causes of complaint between the same parties are improperly joined in the same bill, such matters must be of such different natures or the forms of proceeding in relation to such several matters must be so different, that it would be improper, or very inconvenient, to litigate the same in one suit. For there is no such general principle in the court of chancery that distinct matters between the same parties, and who sue or are sued in the same right or capacity, cannot properly be united in the same bill. On the contrary, there are several cases in which it has been held that matters of the same nature and between the same parties, although arising out of distinct transactions, may be joined in the same suit. These cases are mostly referred to in the well considered opinion of Lord Cottenham in Campbell vs. Mackay, (1 Mylne & Craig's Rep., 616.) And his lordship notices, particularly, the decisions of the vice chan-

cellor and of Lord Brougham, in the case of the Attorney General vs. The Merchant Taylor's Company (1 Mylne & Keen's Rep., 189.) In that case an information was filed to establish eight charitable trusts created by different persons between the years 1518 and 1682. And although the objects of the several trusts were not the same and the trust moneys in some of them were to be loaned without interest, and in others upon interest, but at different rates, yet as the general objects of the various trusts, except one, were in favor of the members of the company or its poor members, the court held that seven of the charitable trusts were properly joined in the same information. But in relation to the eighth trust, as another corporation was interested in the trust and was a necessary party to the suit to establish that trust but had no connection whatever with the other seven trusts, the court permitted the information to be amended by striking out what related to that trust; leaving it to stand as a valid information as to the other seven."

In Daniels Ch. Pr. & Pl., it is said:

"In Purefoy vs. Purefoy, where an heir by his bill prayed an account against a trustee of two several estates that were conveyed to him for several and distinct debts, and afterwards would have had an account as to the other only, the Court decided that an entire account should be taken of both estates for that it is allowed as a good cause of demurrer in this Court that a bill is brought for a part of a matter only, which is proper for one entire account, because the plaintiff shall not split causes and make a multiplicity of suits."

1 Daniels Chancery Practice, 336 (Perkins Ed. 338), citing 1 Vernon, 29. * * *

"But although you can not in general join the administration of the estates of two different persons in the same suit, where the parties interested in such estates are different, yet where the same parties

claim the benefit of both estates, and they are so connected that the account of one cannot be taken without the other, the joinder of them in the same suit will not be multifarious."

1 Daniels, 366, citing Campbell vs. Mackay, 1 M. and C., 603, Lewis vs. Edmunds, 6; Sim., 251, Carter vs. Balfour, 19 Ala., 814; Rump vs. Greenhill, 20 Beav., 512; Young vs. Hodges, 10 Hare, 158.

Nor can a defendant demur for multifariousness on the ground of another defendant who does not object.

As to whether the including of different matters in the same suit renders it multifarious, the rule seems to be that each case is to be governed by its own circumstances.

Multiplicity of suits should be avoided. "If, for instance, a father executed three deeds, all vesting property in the same trustees and upon similar trust, for the benefit of his children, although the instrument and the parties beneficially interested under all of them were the same, it would be necessary to have as many suits as there were instruments, that is a proposition to which I do not assent. It would, indeed, be extremely mischievous if such a rule was established in point of law. No possible advantage could be gained by it, and it would lead to a multiplicity of suits in cases where it could answer no purpose to have the subject matter of contest split up into a variety of separate bills."

Lord Cottenham in Campbell vs. Mackay (7 Simon, 564), and in 1 M. & C. 603 quoted in Gaines vs. Chew, 2 Howard, 643.

And in Campbell vs. Mackay, 1 M. & C. 603, Lord Cottenham held that where the plaintiffs have a common interest against all the defendants in a suit as to one or more of the questions raised, so as to make them all necessary parties for the purpose of enforcing that common interest, the circumstances of the defendants, being subject to distinct liabilities in respect to different branches of the subject will not render the bill multifarious.

1 Dan. Ch. Pl. and Pr., 337.

See also especially Oliver vs. Pratt, 3 How. 411.

This Court in Shield's vs. Thomas, 18 How., 253, in an analogous case, fully reviews the law on this subject as follows:

"There is perhaps no rule established for the conducting of equity pleadings, with reference to which (whilst as a rule it is universally admitted) there has existed less of certainty and uniformity of application, than has attended this relating to multifariousness. This effect, flowing perhaps inevitably from the variety of modes and decrees of right and interest entering into the transactions of life, seems to have led to a conclusion rendering the rule almost as much an exception as a rule, and that conclusion is, that each case must be determined by its peculiar features. Thus Daniel, in his work on Chancery Practice, Vol. 1, p. 334, quoting from Lord Cottenham, says: 'It is impossible, upon the authorities, to lay down any rule or abstract proposition, as to what constitutes multifariousness, which can be

made universally applicable. The cases upon the subject are extremely various, and the Court, in deciding upon them, seems to have considered what was convenient in particular cases, rather than to have attempted to lay down an absolute rule. The only way of reconciling the authorities upon the subject is, by adverting to the fact that, although the books speak generally of demurrers for multifariousness, yet in truth such demurrers may be divided into two distinct kinds. Frequently the objection raised, though termed multifariousness, is in fact, more properly misjoinder; that is to say, the cases or claims united in the bill are of so different a character that the Court will not permit them to be litigated in one record. But what is more familiarly understood by the term multifariousness, as applied to a bill, is, where a party is able to say, he is brought as a defendant upon a record, with a large portion of which, and of the case made by which, he has no connection whatever.'

Justice Story in his compilation upon equity pleading, defines multifariousness in a bill to mean 'the improperly joining in one bill, distinct and independent matters, and thereby confounding them.' And the example by which he illustrates his definition is thus given: The uniting in one bill several matters perfectly distinct and unconnected against one defendant, or the demand of several matters of a distinct and independent nature against several defendants in the same bill. Sir Thomas Plummer, V. C., in allowing a demurrer which had been interposed by one of several defendants to a bill on the ground that it was multifarious, remarks, that 'the Court is always averse to a multiplicity of suits, but certainly a defendant has the right to insist that he is not bound to answer a bill containing several distinct and separate matters relating to individuals with whom he has no connection.' Brooks vs. Lord Whitworth, 1 Madd., 89. Justice Story closes his review of the authorities upon this defect in a bill, with the following remark: 'The conclusion to which a close

survey of all the authorities will conduct us, seems to be, that there is not any positive, inflexible rule as to what, in the sense of a Court of Equity, constitutes multifariousness, which is fatal to a suit on demurrer.' To bring the present case to the standard of the principles above stated, the appellees are seeking a subject, their title to which is common to them all, founded in the relation they bear to a common ancestor. The different portions of shares into which the subject may be divisible amongst themselves, can have no effect upon the nature or character of their title derived as above mentioned; and which in its character is an unit, and cannot be objected to for inconsistency or diversity of any kind. They seek an account and the recovery of a subject claimed by their common title, or an equivalent for that subject, against persons charged with having, by fraudulent combination, withheld and diverted that subject, and who, by such combination and diversion, rendered themselves equally, jointly and severally liable therefor. Upon the face of this statement it would be consistent neither with justice nor convenience nor consistent with the practice, to turn the appellees round to an action or actions at law, for any aliquot parts of each upon a division of this subject claimed under their common title, and which aliquot portions would have to be ascertained by an account which would not depend upon the question of liability of the defendants. The like principles and coniderations would in every case of equal responsibility in several persons, instead of condemning, commend, and in a Court of Equity would command, wherever practicable, a common proceeding against all to whom such responsibility extended."

Shields vs. Thomas, 18 How., 253.

II.

The exceptions filed to the answer for impertinence, necessarily admit the truth of the allegations to which they are filed. The rule is laid down in Van Rensselaer vs. Bruce, 4 Paige, 176, that for the purpose of determining whether or not certain allegations in the answer are subject to exception for impertinence, not only the part excepted to, but every other part of the answer must be taken as true. "And each exception for impertinence must be supported in toto, and if it includes any passage which is not impertinent, it must fall altogether."

Van Rensselaer vs. Price, 4 Paige Ch. Rep., 176.

Exceptions for impertinence must describe the particular passages alleged to be impertinent so that the opposite party would be apprised of what was stricken out, and the proper officer of the Court would know what was to be expunged, if the exceptions are sustained.

Whitmarsh vs. Campbell, 1 Paige Ch. Rep., 645.

Equity Rule 36 of the Supreme Court of New Mexico, in force when this suit was tried contained substantially the same provision. If it does not plainly appear what was stricken out on these exceptions, the Court committed error in sustaining

them. But the Court below has pointed out what was stricken out on the exceptions. In its opinion, it says:

"The complainant in this cause excepted to so much of the answer as set up matters relating to the estate of the elder Perea, upon the ground of impertinence, and demurred to the cross-bill for the reason that the matters alleged therein were not germain to this action, and that it sought to make new parties and was multifarious. The exceptions to the answer were sustained. And, while there is no order in the record to that effect, it is conceded by counsel on both sides that the demurrer was sustained, and the cross-bill dismissed in the Court below; that it was so treated by the parties in said Court; and it is contended here that this Court should so treat it, and pass upon the question as if the record showed the order sustaining the demurrer and dismissing the cross-bill. To this proposition we give our assent; and we shall proceed to determine whether or not there was any error in sustaining the exceptions and demurrer and dismissing the cross-bill.

If the Court below was of opinion that the matters set up in the answer were immaterial and tended only to embarass the litigation, it properly sustained the exceptions. There was a large amount of money ready for distribution among the heirs of the decedent minor child, and that there might be a further large sum recovered at some future time was not a sufficient reason to delay distribution of that which was ready for distribution."

Record, page 233.

It clearly appears that the matter relating to the estate of Jose L. Perea, Sr., and alleging that Jose L. Perea had not received his full share of that estate, that it had not been fully settled, and that the complainant had assets under his control belonging to said minor's estate was all stricken out.

"If the matter of an answer if relevant, that is, if it can have any influence whatever in the decision of the suit, either as to the subject matter of the controversy, the particular relief to be given, or as to the costs, it is not impertinent."

Van Rensselaer vs. Bruce, 4 Paige Ch., 177.

Tucker vs. Chesire R. R. Co., 21 N. H., 38-39.

We submit that the sustaining of these exceptions was not a matter of discretion with the Court—these allegations taken with the allegations in the bill and the other matters of the bill, if true, furnished the defendant a complete defense to the complainant's suit. If, as the answer alleged in substance that the complainant was liable to the said infant's estate for a very large amount of money, an amount largely in excess of his interest in the infant's estate; that said complainant and his co-administrators had failed to collect debts belonging to the common ancestor's estate, and had pretended to turn over parts of debts to the ward; that said complainant and his co-administrators were so indebted for a large amount of money, not only on account of what was due to the said infant's estate, but also on account of what was due to her and her infant son Grover William Harrison as heirs and distributees of the said infant, and for what was due to her as the surviving widow of Jose L. Perea, Sr. This was certainly relevant and, if true, furnished a complete defense to the whole or a part of the relief prayed by complainant's bill. The extent of the defense would depend on the proofs. It was impossible for the Court to do justice between the parties without permitting the allegations to re-

main in the bill, and let the proofs be offered. The record shows that the master properly received no proofs on these allegations, after this ruling by the Court. The offer of such proofs would have been nugatory. It is wholly immaterial that the Court by its III finding of fact states that the guardian "became possessed of all the assets and property of the said Jose Leandro which he inherited from his deceased father." By its rulings on these exceptions and the sustaining of the demurrer to the cross-bill, it held this fact to be irrelevant and immaterial, it deprived defendant of the opportunity to prove the facts, and then, without any evidence whatever, upon which to base its conclusion, finds the fact against the defendants. The quotation from the opinion above made shows this conclusively. The Court says: "That there might be a further large sum recovered at some future time was not a sufficient reason to delay distribution of that which was ready for distribution." It seems to make no difference to the Court that these allegations state that this further large sum of money was in the hands of the complainant and he was responsible for it. The Court does not explain why that was not as much ready for distribution at the time of the filing of this bill as that with which he seeks to charge the defendant.

The rule is, as we have shown, that these facts, for the purpose of the exceptions to the answer and the demurrer to the cross-bill stand admitted.

III.

When it is said that the ruling of a Court as to multifariousness is a question of convenience as enunciated in the authorities above cited, it is not meant that a Court can turn a defendant out of Court and refuse to permit him to put in his defense, either by answer or cross-bill when the matter he urges would furnish a defense to a bill filed against him. If this is a matter of discretion in the case of an original bill, it is not so when an answer sets up affirmative matter and the defendant is sought to be deprived of his defense by exceptions for impertinence.

The defendant was entitled to relief upon the allegations of the cross-bill. He was entitled to the accounting asked for by the cross-bill, if they were true. The demurrer admitted them to be true. The Supreme Court of New Mexico has held that such a suit could be maintained as an original suit.

Perea vs. Barela, 6 N. M., 239.

This was held upon the authority of Payne vs. Hook, 7 Wall, 425.

The defendant could get no affirmative relief without filing a cross-bill. The allegations in the answer were effective for purposes of defense, but the cross-bill was necessary for the defendant to secure a decree against the complainant. The dismissal of the cross-bill under these circumstances is certainly not

an exercise of discretion which an Appellat Court will not review.

IV.

The complainant as administrator of the estate of Jose L. Perea, Second, was liable in a suit for an accounting and settlement of the estate of his intestate for any assets in his hands, or for which he was accountable, whether received before or after his appointment as such administrator. It was immaterial that the allegations stricken out of the answer sought to charge him with assets under his control as administrator of the estate of his and the deceased minor's father, which were received prior to the infant's decease. If he received them, he was liable to the deceased minor; he was equally liable to any distributee of said minor against whom he was asking for a full and complete settlement of the minor's estate. As to the liability of an administrator and his sureties, it is said:

"So too (are included) effects left in the executor's or administrator's hands and property which has come to his possession or knowledge and remains unaccounted for; and this, even though he received the property before his appointment; since the liability

extends to assets before as well as after the execution of the bond."

Schouler's Admin. and Exec., Sec. 146.

To the same effect see Choate vs. Arlington, 116 Mass., 552.

"They (co-executors) are not liable to each other, but each is liable to the cestuis que trust to the full extent of the funds he receives."

Edmonds vs. Crenshaw, 14 Peters, 169.

V.

The first three grounds of demurrer to the cross-bill were upon the ground that the cross-bill was for an accounting as to matters relating to the deceased infant's interest in his father's estate, which was in the hands of the complainant as one of the administrators of said estate. As complainant's bill prayed for a full and complete accounting and settlement of said deceased infant's estate, it is difficult to see how such an accounting and settlement could be had without taking into account the part of said infant's estate for which complainant was responsible as well as that for which the defendant was responsible. (Record, folio 84.)

The fourth ground of demurrer is that said cross-bill is against the said complainant Pedro Perea and Mariano Perea, as administrators of Jose Perea, Sr., who assuch administrators are neither parties of complainant nor defendant in said original bill. As to this contention, it is enough to say that the jurisdiction of a Court of Chancery as such, in a case like this, does not depend upon the representative character of the parties alone. The jurisdiction is taken upon the ground of a trust. These parties were before the Court and the complainant was asking for a full settlement and accounting as to his intestate's estate. He was asking for a recovery from the defendant for the interest in the estate to which he and said Mariano might be entitled. If that ground of demurrer is good, then it follows that the complainant's bill was filed upon a mistaken theory—that is to say, that a full accounting and settlement of said estate could be had in this suit.

The fifth ground of demurrer does not materially differ from the first three.

VI.

All the parties interested in both estates were before the Court except Jesus M. Perea. He was dead, and the answer and cross-bill alleged that there had been no administration on his estate. No objection was urged by the complainant that there was any defect of parties. The parties to both the original and cross-bills are the same.

In the case of Nelson vs. Hill, 5 How., 127, this Court held that where there were two mercantile firms and some members common to both, a creditor's bill was not multifarious when filed against the personal representatives of two of the deceased partners of the two firms and also against the surviving partner of one of the firms. This Court reversed the Court below for dismissing the bill on the ground of multifariousness. Our case is certainly stronger against the claim of multifariousness. All the parties are equally before the Court in whatever capacity they may be sued. The bill prayed "That a final decree may be entered for a settlement of said estate and the distribution thereof, and that your orator as surviving administrator be decreed his reasonable expenses including solicitor's fees against said George W. Harrison individually and as administrator as aforesaid, in and about this suit &c.," and the Court proceeded to render a decree against said defendant individually. In other words, the defendant is to be held liable in his individual capacity for assets in his hands on a prayer for a full and complete settlement of the intestate's estate, but when he asks that at the same time complainant be held to account for assets in his hands in which the defendant is interested, he is to be denied relief upon the ground that the de-

fendant holds such assets in a representative capacity. This, too, despite the fact that the defendant, if liable, is so in his representative capacity as administrator of his deceased wife.

VII.

The cross-bill alleged that another son of the said Guadalupe and Jose L. Perea, Sr., had died since the said Jose L. Perea, Sr., leaving surviving him as his heirs at law, the said Guadalupe his mother, and that she was entitled to all and singular the property, estate and effects to which he was entitled as the son of said Jose L. Perea, Sr. (Record, folio 58.) She claimed through her own right as widow and both her sons, Jose L., Segundo, and Julian, who died after their father, Jose L., Sr. The defendant George W. Harrison, and Grover William, issue of the defendant and the said Guadalupe, claimed through the said Guadalupe and the said Jose L., 2nd, and Julian. If it is contended that the Court was right in sustaining the exceptions to the answer, and the demurrer to the cross-bill so far as they attempted to set up interests claimed through Julian and Guadalupe in the estate of Jose L. Sr., it certainly was in error in sus-

taining the exceptions and demurrer as to interests claimed through Jose L., 2nd in the estate of his father. The original bill asked for a full and complete settlement of the estate of Jose L., 2nd. It could not be had without ascertaining what his interest in his father's estate was. Assuredly the complainant ought to have been held liable for what was in his hands.

Exceptions to an answer cannot be sustained unless good in toto.

Finch vs. Cheese, 1 Beavan, 571.

Balcom vs. N. Y. Life Ins. & Trust Co., 11 Paige Ch. 455.

1 Dan. Ch. Pl. & Pr. 759 and note.

The demurrer also went to the whole of the cross-bill, and being too broad, should have been overruled.

"It is an established and universal rule of pleading in chancery that a defendant may meet a complainant's bill by several modes of defense. He may demur, answer and plead to different parts of the bill, so that if a bill for discovery and relief contains proper matter for the one and not for the other, the defendant should answer the proper and demur to the improper matter. *But if he demurs to the whole bill, the demurrer must be overruled.*"

Livingstone vs. Story, 9 Peters, 658.

See also Giant Powder Co. vs. California Powder Co., 98 U. S., 126.

The demurrer to the cross-bill and the exceptions to the answer were submitted at the same time in the District Court. (Record folios 86-87.) The Supreme Court as well as the parties to the suit, treated

the demurrer as having been sustained by the Court and the cross-bill dismissed. (Record, page 233.)

VIII.

According to the allegations stricken out of the answer and the cross-bill, neither the estate of Jose L. Perea, Second, nor that of his father had been settled. The latter had only been partially settled and distributed. The parties interested in both estates were the same, and were all before the Court except Jesus M. Perea, who was made a party to the original suit, but died after the suit was brought. If necessary, the suit could have been revived as to him. If he was a necessary party to the cross-bill, he was also a necessary party to the original bill. Guadalupe Perea de Harrison, as already shown from the allegations of the cross-bill, claimed a further interest in her deceased husband's estate on her own account and through her two deceased sons, Jose L., 2nd, and Julian. The latter had died prior to the death of Jose L., 2nd, and prior to the enactment of the distribution act passed by the Legislature in 1887. As the law stood when he died, all his estate passed to his mother.

Compiled Laws of New Mexico (1884) Title XX, Chaps. III and IV, Section 1436, is as follows:

"In the absence of children or descendants the nearest ancestors become heirs, such as parents, and in the absence of these the paternal or maternal grand parents."

This was changed by the act of 1887, so that the mother inherited one-half her deceased son's property, the other half going to his surviving brothers and sister's. See Laws of 1887, page 60.

IX.

Under the facts as alleged, the defendant was entitled to an accounting as to both estates.

In Purefoy vs. Purefoy, above cited, it was held that a bill for an accounting only as to one estate, under such circumstances, was demurrable.

Purefoy vs. Purefoy, 1 Vernon, 29.

1 Daniel's Ch. Pl. and Pr., 336.

"Where the same parties claim the benefit of both estates and they are so connected that the account of one cannot be taken without the other, the joinder in the same suit will not be multifarious."

1 Daniel's Ch. Pl. and Pr., 344, supra, and authorities cited.

Neither does the fact that rights are claimed against the complainant both as administrator and individually, or that the defendant claimed in a dual capacity render the bill multifarious.

The Supreme Court of Massachusetts, where a suit was filed by a widow as complainant, asserting rights in property both as administratrix and widow, held that the bill was not demurrable, saying:

"This is a bill in equity, to which the defendant demurs for several causes. The first is, that the plaintiff is the widow of Thomas Robinson, mentioned in the bill, and the administratrix on his estate, and claims the right to maintain the suit in both capacities. And this, it is argued, renders the bill multifarious. The opinion of Story, J., in the case of Carter vs. Treadwell, 3 Story R. 51, is cited in support of this objection. 'The bill,' Judge Story says, 'is open to the objection of multifariousness in mixing up an independent claim of Carter's' (the plaintiff) 'in his own right, with the transactions of Adams with the defendant, with which he had nothing to do, except in his capacity as administrator.' Such, however, are not the facts in the present case. The plaintiff claims, in both capacities, under the said Thomas Robinson. Both claims are homogeneous in their character, and it is immaterial to the defendant, in which capacity the plaintiff claims. This case comes within the rule of pleading laid down by Daniel, and which is supported by the cases cited by him: Where the plaintiff claims the same thing under different titles, the statement of them in the same bill will not render it multifarious. 1 Daniell Ch. Prac., 395."

Robinson vs. Guild, 12 Metcalf, 323.

See also Story's Eq. Pl., Secs. 254, 271, 280.

X.

The complainant brought his suit in behalf of himself as sole surviving administrator of Jose L. Perea, 2nd, and as one of the heirs at law of the said Jose L. Perea, second, deceased, against George W. Harrison individually and as administrator of the estate of Guadalupe Perea de Harrison. (Record, folio 3.) He asks for a decree in his favor as heir-at-law against the defendant in his dual capacity, and the Court renders a decree against the defendant in his individual capacity. Yet it is contended that the defendant in this suit could not have an accounting against him either as administrator or individually. Under the allegations in the cross-bill, the complainant and the defendant Mariano Perea, co-administrators of the estate of Jose L. Perea, may have been liable to the defendant on account of his interest in the estate of said Jose L. Perea, 2nd, in a sum of money largely exceeding the amount decreed against him. The Court cannot deny the right of the defendant to an accounting against the complainant, and said Mariano Perea for assets belonging to the estate of Jose L. Perea, Sr., and a share of which be longed to said deceased minor and his mother, upon the ground that to do so is to sue them as administrators, and then render a decree in the same cause against the defendant in-

dividually for assets which were in the hands of his intestate as administratrix.

XI.

The complainant contended in the Court below, and the master found, that upon the appointment of Guadalupe Perea de Harrison as administratrix of her deceased son, she ceased by operation of law, to hold such assets belonging to her estate as were then in her hands as guardian, and thereafter held them as administratrix. Appellant is disposed to concede this proposition.

Sugar vs. The State, 6 Harris and J., 162, 14 Am. Dec., 265.

Appellant insists, however, that the principle is equally applicable to the appellee, Pedro Perea, and that when he was appointed administrator of the estate of Jose L. Perea, 2nd, the share of said decedent in the undistributed assets of his father's estate *passed by operation of law from him as his father's administrator to him as administrator of the deceased minor, Jose L. Perea, 2nd.* This furnishes an additonal

reason for holding him to account for such assets in this suit.

XII.

The 16th assignment of error is as follows:

"The Court erred in rendering a decree in this cause against the defendant in his individual capacity, when upon the facts, if he is liable at all, he is liable as administrator of Guadalupe P. Harrison." Folios 363 and 366.

A decree against an administrator for the liability of his intestate, upon whatever state of facts the liability arises, is *de bonis intestatoris*, and should not be against him individually.

In Foster vs. Wilber, 1 Paige, Ch. 541, Chancellor Walworth, where an accounting was sought against executors of an executor, for assets which had been in the hands of his testator, in his representative capacity said:

"The appellants, therefore, are not the executors of Wilber, and have nothing to do with his estate. If their testator had made himself liable by maladministration, they are liable as debtors to that estate, to the amount of the assets of Murphy (their testa-

tor) in their hands, to be paid in a due course of administration."

Foster vs. Wilber, 1 Paige, Ch. 541.

In another case where the decree was personal the same Chancellor said:

"Such a proceeding was improper and wholly unauthorized, if the account of Sanger's estate was to be settled as upon the application of the petitioners as his creditors and the surrogate has decreed the payment of the amount found due upon that accounting, out of the estate of Sanger (the deceased executor) in the hands of his executors; but without making a single inquiry for the purpose of ascertaining whether the estate of Sanger was sufficient to pay all his debts or even the amount of this decree."

Dakin vs. Deming, 6 Paige, Ch., 98.

It may be contended that a personal decree against the defendant is justified by the master's 9th finding of fact, that the defendant from the time of his appointment as administrator of the estate of his deceased wife, refused to account with the complainant as surviving administrator of Jose L. Perea, Segundo; "but retains said estate mingling the funds with his own, having the same deposited to his individual credit in bank, claiming that Guadalupe Perea de Harrison, his late wife, did not hold said estate by virtue of her appointment as administratrix thereof, because of her appointment as guardian of said minor." Record, folio 119.

The Supreme Court finds as facts that on the 23d day of July, 1884, Guadalupe Perea was appointed guardian, and as such, became possessed of all the assets and property the ward inherited; that on September 2nd, 1885, the defendant married the said

Guadalupe Perea, widow as aforesaid; that immediately after the intermarriage, the said defendant took charge and control of the affairs of said Guadalupe, including the assets of said minor; that he reduced the assets of said minor to money and mingled the same with his own funds and deposited the same in bank to his individual credit, and at the time of final decree in the case in the District Court, he retained subject to his individual control, all of the moneys belonging to the estate of Jose Leandro Perea, Segundo. It further found that complainant and Guadalupe P. Harrison were appointed joint administrators of the estate of the deceased minor on September 5th, 1887; the said Guadalupe qualified on October 1st, 1887; that after the death of the minor, *the said Guadalupe P. Harrison, during her lifetime, and George W. Parrison after her death* claimed to hold the said assets of the said Jose L. Perea, Segundo, not as administrator upon the pretense that there could be no distribution of such assets until the final account of Guadalupe Perea de Harrison as guardian was settled by the Probate Court. (Record folio 372.)

It appears from the findings of fact that the estate was in money and if converted and mingled, this had been done prior to the death of Guadalupe P. de Harrison.

The master found that "after the death of Guadalupe Perea de Harrison, Pedro Perea, the surviving administrator, was the only person entitled to the possession of the estate of said Jose L. Perea, Segundo, and G. W. Harrison by retaining possession of said estate and refusing to deliver the ame over to aid administra-

tor became liable for the proper management and control thereof." The Supreme Court followed his finding of law in this particular, and appellant insists that it is error.

Creditors of a deceased debtor cannot affect a third person as trustee on account of property wrongfully received from the administrator of the debtor, unless it is shown that there is no remedy against the administrator and his sureties. In such a case, Chancellor Walworth said:

"There is nothing in this, therefore (the estate on appearing to be insolvent) to show that the complainant has not a perfect remedy against the administratrix and her sureties for the amount due upon his judgment. He has then no right to follow the personal estate into the hand of a third person, to whom, if the allegations of the bill are true she has paid it of her own wrong."

Jackson vs. Forrest and Leggett, 2 Barbour's Ch., 576.

This case holds that a bill against a third person seeking to hold him individually on account of assets wrongfully transferred to him by the administrator and at the same time making the administrator a party praying as against her for an accounting as to the estate, was multifarious. If the estate is not insolvent and the assets in the hands of the administrator are sufficient to satisfy all demands against it, it is immaterial what disposition has been made of other assets by the administrator or the decedent in his lifetime. It is only when proceedings against the administrator are unavailing that third persons can be called to account for assets in their hands. If

recourse is attempted to be had against the administrator and the third person for assets in his hands at the same time without alleging and showing that the recourse against the estate is fruitless, the bill, according to Chancellor Walworth, is multifarious. The fact that the third person received assets from the decedent in his lifetime, and afterwards became his administrator, does not change the principle. The defendant individually and the defendant as administrator of his deceased wife are as distinct in law as if there were two different persons, and the circumstance that the transactions took place between him and his wife is in no way material.

XIII.

According to the authority last cited, there were no allegations in that original bill which would justify a decree against the defendant individually. To support a decree, there must be allegations and proofs to sustain them.

Sims vs. Guthrie, 9 Cranch, 19.

Crocket vs. Lee, 7 Wheat., 522.

Carneal vs. Banks, 10 Wheat., 181.

Harding vs. Handy, 11 Wheat., 103.

Harrison vs. Nixon, 9 Peters, 483.

Neither the findings of the master nor of the Territorial Supreme Court justify the decree against the defendant individually or the rate of interest charged. *The assets of the estate of the deceased minor upon the death of Guadalupe P. de Harrison, became a part of her estate in the hands of her administrator, and the claim of the surviving administrator to recover it, was a debt against her estate,* The commingling as found by the master and the court was a commingling of the estate of his own intestate before her death with his own property. As to this the complainant is not concerned until he shows that the decedent's estate is insolvent and that his debt cannot be made out of it.

XIV.

No accounting can be had against the defendant George W. Harrison individually, and no decree against him to turn over property to the surviving administrator, unless the specific property for which he is held responsible individually, or which he is ordered to turn over, be identified and distinguished

from other property of his intestate, the deceased administratrix, in his hands.

"B, administratrix of her son P, died without having rendered an account. The inventory filed by her showed assets of the value of $3,772.03. By her will, O was appointed her executor, and he filed an inventory of her estate showing assets of the value of $13,000, but he could find no property or fund which could be identified as being held by her as P's administratrix. O, as executor, advertised for and paid all claims presented, applied for a judicial settlement and, under a decree of January, 1882, distributed B's estate among her four children. In December, 1884, certain grandchildren of B applied to the surrogate for an order compelling O, as executor, to account for the funds received by B, as administratrix of P. Held, that the petition was properly denied. Petitioners were in the position merely of creditors of B's estate, their vested rights in the fund having been lost by the inability to distinguish it from the other property of B."

In re O'Brien, 45 Hun's, 284.

The bill was not framed upon the theory that any specific property was in the hands of the defendant which could be identified as belonging to estate of the deceased minor. It did not pray that he be held accountable for, or turn over any specific property. It seeks to charge him for assets that remained in the hands of his deceased wife, at the time of her death, and for which she was accountable. The decree must follow the bill, and neither the bill, proofs, nor findings of fact justify a personal decree against him.

The VIII finding expressly states that said Guadalupe P. Harrison during her lifetime claimed to hold the assets of the estate of the said Jose L. Perea as

his guardian. By the X finding the Court finds that after her death he was in possession of the assets of said minor's estate. It does not identify any of said assets or find that he was in possession of them in any way different from that in which he was in possession of the balance of her estate. The commingling found had taken place before her death.

XV.

The personal representative of a deceased executor or administrator cannot be called upon to settle the accounts of his testator or intestate.

Reed vs. Wilson, 73 Wis., 497 (41 N. W. Rep., 721.)

Schench vs. Schench's executors, 3 N. J. Law, 562.

Dakin vs. Deming, 6 Paige Ch., 95.

Bush vs. Lindsley, 44 Cal., 121.

In re Fithian, 44 Hun., 457.

Tracey vs. Hadden, 78 Ill., 30.

"Upon a trustee's death he ceases to be a trustee, and as to him the trust no longer continues. His indebtedness to the trust becomes a demand against his

estate to be authenticated, allowed, classed and paid out of the assets of his estate as other demands."

Hill vs. State, 23 Ark.; 5 Am. & Eng. Enc. of Law, 212.

"Where a co-executor dies his estate becomes liable for everything that he was liable for at the time of his death."

11 Am. & Eng. Enc. of Law, 1,032.

"The executor of an administrator can not be charged as the representative of the original intestate."

7 Am. & Eng. Enc. of Law, 206; Arline vs. Miller, 22 Ga., 330.

Scott vs. Fox, 14 Md., 388.

Foster vs. Wilber, 1 Paige's Ch., 537.

Trescott vs. Trescott, 1 McCord's Ch., 417.

Smith vs. Moore, 4 N. J. Eq., 485.

The rule of the common law was that upon the death of an executor, the executorship devolved upon his executor, but as to joint administrators or executors the rule of survivorship applied.

7 Am. & Eng. Enc. of Law, 204.

And at common law the executor of a deceased executor was not liable for a devastavit committed by his predecessor.

7 Am. & Eng. Enc. of Law, 333, and cases cited.

In equity the practice has been to charge the per-

sonal representative with the consequences of a breach of trust, and this is the rule as to executors and administrators.

7 Am. & Eng. Enc. of Law, 334.

The rule has always been, however, as already stated, to hold the representative responsible, only to the extent of the assets of his decedent, or for specific property traced to his hands.

Nor can an executor be compelled to account in the same proceeding for the property of his own testator, and that held by his own testator in his representative capacity.

See Murray vs. Vanderpoel, 2 Demarest (N. Y.,) 311, and cases cited in 7 Am. & Eng. Enc., 206 and notes.

An action for a legacy under the will of the first testator cannot in Pennsylvania be maintained against the executor of an executor.

Gilliland vs. Bredin, 63 P. St., 399.

In North Carolina the Courts have held that a legatee can sue the executor of an executor, who has in his hands funds of the first testator, although creditors can not do so. But it is necessary to take an account of the assets of the second testator.

Brotten vs. Bateman, 2 Devereux Eq., 115. (22 Am. Dec., 734.)

All these citations serve to illustrate and strengthen the position of the defendant that the only decree

that could be rendered in this cause under the allegations and proofs, was against the defendant as administrator.

XVI.

The Court erred in following the master and charging the defendant with interest on the balance found due at the rate of six per cent per annum. (See the 9th assignment of error.) The bill charges that the defendant after the death of his wife and after he qualified as administrator refused to turn over to complainant assets which had been in her hands. (Record, folios 12-13.) The master by his 9th finding of fact (Record, folio 119) and the Court by its XII (Record, page 229) and its decree (Record, page 221) charge the defendant with interest as above stated. Appellant insists that he should not have been charged with interest under the facts and circumstances of this case.

We have already shown that the defendant was not accountable for said estate to complainant and that it was not defendant's duty to account to complainant.

The cases above cited show this.

Dakin vs. Deming, 6 Paige, 95.

Reed vs. Wilson, 41 N. W. Rep., 719.

Schenck vs. Schenck, ex rs., 3 N. J. L., 562.

Bush vs. Lindsey, 44 Cal., 121.

Tracey vs. Hadden, 78 Ill., 30.

The case of Reed vs. Wilson, supra, hold that when by statute it is provided that upon the death of a personal representative the administration shall not pass to the personal representative of the deceased administrator, such personal representative cannot be called upon to settle the estate of the first intestate. That he is a stranger to the first intestate's estate. The result follows here, not by statute, but by the survivorship of the complainant, as co-administrator of the deceased. Some of the authorities above cited hold that the claim can be presented to the Probate Court. Where the claim of an heir to his distributive share was not paid before the administrator died, and it was presented as a claim against his estate and allowed, the Court said:

"This, she had a perfect right to do. She could elect to present her claim against the estate, or proceed on the official bond of the deceased administrator. She chose to do the former, and we are at a loss to understand what objection can be urged against the proceeding."

Tracey et al., Admin., vs. Adams, 78 Ill., 30.

In Bush vs. Lindsey, 44 Cal., 125, the Court says:

"We are referred to no provision of the Probate Act, which authorizes the Probate Court to cite the administrator of an administrator, to settle the account of his intestate with the estate of which he was the administrator, and, after a careful examination of

the Act, we find none which confers that authority The power must be lodged in some tribunal, to require such an account to be taken and settled; and if the Probate Court does not possess it it must reside in the District Court, as a branch of its equitable jurisdiction. Those who are interested in the estate have an undoubted right to recover from the administrator the money and property remaining in his hands, which belong to the estate; and in order to ascertain the amount of such money and property, an account must be taken. Proceedings having that object in view, bear clearly marked equitable features, and jurisdiction thereof pertains to the District Court; and that Court has competent authority to hear and determine the matter, unless the Probate Court possess the exclusive jurisdiction.

The Court then discusses the California statutes and constitution, and concludes that the Probate Court had no jurisdiction. This is not the important point for us, but what concerns us, is that the defendant was under no obligation to deliver the value of the estate received by his intestate to the complainand. *In fact he could not lawfully do so*, and it was necessary that proceedings, either in equity or before the Probate Court, should be had. While these proceedings are being had is the defendant to be compelled to pay interest? Is this true especially in view of the facts in this case? It was contended by defendant's intestate that the complainant and his co-administrators of the estate of Jose L. Perea, Sr., had never accounted to her for her full interest,or that of Jose L. Perea, 2id, in his father's estate, and she had brought suit against said administrators for a settlement of the estate of said Jose L. Perea, Sr., Under such circumstances the law does not justify the charging of interest against the defendant personal-

ly, or as administrator, from January 6th, 1890, the date of his appointment as administrator.

"Interest on assets is not chargable against executors and administrators as of course, but may be charged as the circumstances of the particular case may warrant."

Walker vs. Walker, note 99 Am. Dec., 296.

"But if those interested in the estate have been equally guilty of laches in protracting a settlement, interest is not chargable."

Forward vs. Forward, 6 Allen, 494.

"So if there are circumstances rendering it unsafe or injudicious for an administrator to proceed to a settlement and to a distribution of the assets, as if suits were pending, or there was a just reason to anticipate the commencement of suits, or if there was any other necessity, upon which he acted in good faith, in keeping the money he should not be made liable for interest. Clark vs. Knox, 70 Ala., 607. * * * * What time is an unreasonable delay in making settlement and distribution, is, therefore, said to depend on the circumstances of each case—that is on the situation and condition of the estate, the complication of its affairs, and the obstacles to an earlier settlement."

99 Am. Dec., 297, and cases cited.

"But the mere fact that he mingles the money of the estate with his own by depositing it in his own name as he does his individual money, cannot be held a sufficient ground to charge him with interest. So long as he has the money of the estate at his command, ready to answer the order of the Court, this is all that the law requires. Estate of Schofield, 99 Ill., 513. * * * Nor will he be charged with interest where it is not certain that he used the money of

the estate for his own profit, there being a mere suspicion that he did. Grant vs. Edwards, 93 N. C., 488."

All the foregoing authorities apply to the question of the liability of the estate of Guadalupe Perea for interest. There can be no question that Harrison is not liable for it, because any dealing of his after the death of the intestate was with *her estate*' not the *deceased minor's* and he is not accounting for that in this suit, and could not be so held to an accounting as already shown.

XVII.

The fact that his co-administrator did not in her lifetime, turn over funds in her hands, did not justify the Court in following the master's fifth finding of fact (Record, page 73) and by its decree (Record, page 222) that the sum of $30,361.24 was the amount due on account of said minor's estate. This sum was arrived at by the master by charging interest at six per cent upon each item received by the guardian from the date of its reception to the date of his finding.

The bill alleges that Guadalupe P. Harrison re-

fused to recognize complainant as administrator and continued to claim that she held the assets in her hands as guardian. After she became his co-administratrix she was not bound to turn over the assets in her hands.

"One executor having received funds can not exonerate himself, and shift the trust to his co-executor by paying over to him the sums received. Each executor has the right to receive the debts due to the estate and discharge the debtors; but this rule does not apply as between the executors. They stand upon equal ground, having equal rights, and the same responsibilities. *They are not liable to each other*, but each is liable to the cestui que trusts, to the full extent of the funds he receives. (Douglas vs. Satterlee, 11 Johns', 16; Fairfax, exec., vs. Fairfax, 5 Cranch, 19)."

Edmonds vs. Crenshaw, 14 Peters, 164.

If he does any act which permits his co-executor to get possession of assets in his hands, the co-executor thus doing so becomes responsible for the other one, if the latter misapplies the assets.

See 11 Am. & Eng. Enc. of Law, 1027, and numerous authorities cited.

XVIII.

It is not true that the guardian was called upon to act with reference to the estate until her accounts had been settled. The functions of a guardian and administrator are different and upon the death of the ward the guardian is entitled to have a final settlement in the Probate Court and a discharge as guardian, and to a decree transferring the estate to the administrators. Especially is this true if the guardian and and another are appointed co-administrators.

Emmerson vs. Webster (N. Y. Supreme Court), 12 N. Y. Supplement, 789.

It is alleged in the bill that defendants intestate claimed to hold the estate as guardian after the death of her ward, and both complainant and the master and the Court below seem to have thought this important. It is wholly immaterial, since she had a lawful right to hold it as administratrix as against the complainant, and was not accountable to him for it. While it is true that by operation of law, the guardian may be held as administratrix after her appointment as such, upon the death of the ward, it is not true that she thereby became accountable to the complainant as her co-administrator for the portion of the estate in her hands.

Sugar vs. State, 6 Har. & Johnson, Supra.

XIX.

The Supreme Court of the territory seems to have followed the District Court and that Court followed the master, on the subject of interest, for the following reasons, the master finds, as follows:

"Neither Guadalupe Perea de Harrison nor her husband George W. Harrison, made any effort, so

far as the testimony shows, to loan the funds of said estate, or to procure an order of the Probate Court for that purpose.

"Some of the funds of said estate which were in the shape of paying investments, to-wit, sheep and bank stock, were withdrawn from such investment and converted to cash, *which produces little or no income at all.*" (Record 120.)

His findings of law applicable to these facts are as follows:

First. The powers of Guadalupe Perea de Harrison as guardian of Jose L. Perea, Segundo, ceased immediately upon the death of said ward.

Second. After appointment as administratrix of the estate of Jose L. Perea, Segundo, Guadalupe Perea de Harrison held said estate as such administratrix and not as guardian of said deceased minor.

Third. Section 1018 of the Compiled Laws of New Mexico, 1884, makes it the duty of a guardian to loan funds of the ward beyond what may be necessary for the support and maintenance of the ward, under the direction of the Probate Court; and section 1019 makes such guardian liable for interest if he fails to loan the money of his ward as aforesaid. (Record, folio 120.)

Sections 1018 and 1019 of the Compiled Laws are as follow:

"1018. If, at any time, any guardian shall have on hand any money belonging to his ward beyond what may be necessary for his education and maintenance, such guardian shall, under the direction of the court, loan the same to such persons as will give good security therefor, and such money shall be loaned on such time as the court shall direct."

"1019. If any guardian fail to loan the money of

his ward on hand as aforesaid, under the provisions of this act, he shall be accountable for the interest thereon. Ortiz vs. Salazar, Vol. 1, page 355, N. M. Rep."

Appellant calls attention to this because the court that she held the assets of the ward after his death as administratrix, but was responsible for interest as guardian. She was under no obligation to invest the money or lend it out when the court had not directed her to do so, after it was converted into cash, which produced, as the master found, little or no income at all. Certainly not while the contest over the settlement of these two estates was going on.

In a similar case it was held:

"The Orphans Court charged interest on the additions which they made to the accounts, from the time of filing the accounts to the time of pronouncing their decree upon the exceptions. The exceptants insist that the Court should have charged interest on those additions up to the date of the decree, and that they should have charged the accountant with interest on the balances of his accounts, as rendered by him, from the time of filing those accounts to the date of the decree. The Court decreed that he should pay interest on the money with which they surcharged his accounts, because he seems to have followed the master. He found had not accounted for that money. Had he done so, the exceptants would have been at liberty to have taken it. The Court found that it was due to the wards. It was right, on that ground, to compel the accountant to pay interest for it from the time of filing his accounts. That the period during which he was required to pay interest was not extended to the date of the decree, was probably attributable to the consideration that it was quite as much the fault of the exceptants, as it was his, that the decree of the Court was not reduced to writing when it

was pronounced. No objection is made on the part of the accountant, to the decree in respect to interest. The exceptants not only seek, by these appeals, to extend that charge of interest from the time of pronouncing the decree to the time of its date, but they seek also to charge the accountant with interest on the original balances from the time of filing the account to the date of the decree. There is no authority for charging an accountant with interest on the balance of his final account in such a case as this, unless it appears that he has made use of the money for his own purposes. The money was not invested when the accountant filed his accounts. He was under no obligation to invest it, but is presumed to have it in hand, and to have had it in hand ever since he filed his accounts, ready to be paid over whenever the balance should have been established. If, however, he has made use of the money, he is chargeable with the interest for the time he has used it, and the inquiry may be made in this Court, with a view to charging him accordingly."

In re, the Mott Appeals, 26 N. J. Eq. 512.

The Court holds that there is no authority for charging interest on the balance of his final account. That the accountant should be decreed to pay interest after filing his account only for the money with which his account was surcharged. It places its conclusions upon the ground that the accountant stood ready to pay the sums admitted. The balance by the guardian in her report filed on March 6th, 1888, was $17,670.61. The complainant sought to surcharge the account with items amounting to $3,383.90. The master and the Court charged her with only a part of these items. (See Exhibit C to complainant's bill, Record, pages 10 to 12. Complainant's exceptions to the Report. Exhibit D to Bill, Record, page 14.)

Half of this estate upon the death of her ward, belonged to Guadalupe P. Harrison absolutely. The defendant subsequently acquired three-twenty-sixths more in his own right and another twenty-sixth belonged to Grover William Harrison, an infant son of the defendant and said Guadalupe; nine twenty-sixths belonged to the complainant and the defendants, Jose L. Perea, Benicio F. Perea, Mariano Perea, Jacobo Perea, Beatriz Perea de Armijo, Soledad Perea de Castillo, Josefa Perea de Castillo, Barbara Perea de Yrisarri. (See master's findings VII and VIII, Record, page 74.) To these findings of the master no objections or exceptions were ever filed by the complainant, but they were confirmed by the District Court. (See decree of the District Court, Record page 211.) There was no cross appeal taken from the decree rendered by the District Court. The Supreme Court affirmed the decree with slight modifications, none of which relate to these findings or the provisions of the decree based on them. (Record, page 221.) Complainant cannot question them here for the first time. To charge the defendant interest under these circumstances at the rate of six per cent upon each item of assets from the date of its reception, we submit was error. In her reports above referred to she had charged herself with dividends, interest and receipts for wool produced by sheep. The complainant could have taken steps in the Probate Court on March 6th, 1888, to have the balance shown by the guardian's report distributed, but did not do so, but waited until April, 1890, after the death of his co-administrator,

and brought this suit.

The Court of Appeals of Kentucky, where a widow was appointed administratrix of her deceased husband's estate, and upon a discovery of a will, was subsequently removed, the Court held that she was not to be charged with interest upon the whole balance in her hands. It said:

"We think she, being then entitled to have paid her share in the estate, should not be charged interest on any more of what was in her hands than may be found upon calculation to have been at that date in excess of her distributial share."

Miller's Ex. vs. Simpson, 2 Southwest Rep. 171 (Court of Appeals of Ky. Dec. 1886.)

It is true that after charging interest on the whole estate, the Court allowed the defendant to retain seventeen twenty-sixths of it, but it charged commissions and attorney's fees upon the basis of interest on the whole estate.

Under sections 1018 and 1019 of the compiled Laws, a guardian is not liable for interest because he fails to lend the funds of his ward, unless the Court orders him to do so. The statute restricts and limits the common law by requiring the Court to direct the lending—otherwise as a general rule the guardian would be required to lend the ward's money without any such direction. If the Court does not direct him to lend it, the statute does not charge him with interest. He makes his reports every year to the Court, and the Court is supposed to order him to lend the money, if in its opinion, it is proper under the circumstances to do so. If it made no such order, the presumption is that the Court did its duty and was

satisfied that the interests of the ward and his estate would not, under the circumstances, be promoted by lending the money. Under a similar statute the Supreme Court of Alabama says:

"On neither of the partial settlements was the guardian charged with interest, which was tantamount to a judicial determination that it was not practicable to lend the surplus money on bond and mortgage, or on good personal security."

The burden of proving that it was impracticable to do so is thereby removed from the guardian.

The statute of Alabama does not expressly make it the duty of the guardian to lend, under the direction of the Court, as our statute does, nevertheless the Court said:

"If the expressions in the opinion in the case of Ashley vs. Martin, 36 Ala., 330, were intended to declare that the practicability of loaning money of the ward rested on the sole judgment of the guardian they must be modified in conformity with these views."

Thompson vs. Thompson, 92 Ala., 545, 9 Southern Rep., 465.

A guardian is not liable for interest unless he is directed by the Probate Court to invest the money of his ward.

Reynolds vs. Walker, 29 Miss., 250.

See also 9 Am. & Eng. Enc. of Law, 119, citing:

Brand vs. Abbott, 42 Ala., 499.

Ashley vs. Martin, 50 Ala., 537.

State vs. Foy, 65 N. C., 265.

The Supreme Court of Missouri also held to the

same effect as the Alabama Court. In the case the curator of the estate subsequently became a trustee of the estate and suit was brought upon his bond as trustee. The sureties defended upon the ground that he had not ceased to hold the estate as curator, and that by mingling the ward's funds with his own before he qualified as trustee, he had already converted them. The Court says:

"Nor is it at all conclusive that Branch was guilty of a *devastavit* because he did not keep these funds of his ward at all times separated from his individual moneys. It was his duty to invest them for her, if he could find a safe investment. If he could not, it was his duty to report that fact to the Probate Court. The prevailing practice, fixed by statute, is to require the curator to append to his settlement an affidavit showing to whom, and on what security, he has loaned his ward's estate; and, if he has it on hand, he must state that fact also. In the absence of evidence to the contrary, we must presume the Probate Court of St. Louis required the curator to make his settlements according to law. If so, and Branch disclosed to that Court that he had the money in his own hands, and these settlements were approved, it would hardly be said there was such a wasting of the estate as would be a breach of his bond. Now, outside of this failure to keep a separate account, there is no evidence whatever tending to show a *devastavit* on 28th December, 1883; so that we think the record does not sustain appellant in saying there were no assets to transfer. Nor do we agree with him that solvency of the curator is an immaterial fact to be shown on this issue."

Titman vs. Green, 108 Mo., 22; 18 Southwest Rep., 889.

The case is also instructive on the transfer of funds by operation of law, where the same person qualifies

in a new capacity, having funds held in another. The Court says:

"But, in our view of this case, it is unnecessary to invoke a presumption so strong. The authorities, with great unanimity, agree that where the same person succeeds himself in a different fiduciary relation, or where they both exist at one time, if he is clearly entitled to the trust fund in his new capacity he is entitled to make the election, and if he does so by some affirmative, unequivocal act, from that time he will be required to account in his new trust relation."

XX.

The Court erred in holding that the complainant was entitled to receive the statutory commission, none of which he had ever received or disbursed. (See Appellant's 10th, 11th, 12th and 7th assignments of error.)

The decree finds that complainant as administrator is entitled to statutory commission upon the sum of $35,869.70, the whole amount of the estate, with the interest for which the defendant is held responsible. This, too, although the decree allows the defendant to retain on account of his deceased wife's interest, the three shares he had purchased and that

of his infant son Grover William Harrison, seventeen twenty-sixths parts of that sum; and that he pay over to said complainant the remaining nine twenty-sixths to be distributed as directed by the decree. (Record, page 222.)

The New Mexico statute fixing administrator's fees is as follows:

"Administrators and executors shall be entitled to a commission upon the amount of money or property at the appraised value, which comes into their hands as such, of ten per cent on the first three thousand dollars, and of five per cent on all amounts above the first three thousand dollars."

Acts of 1891, Sec. 2, page 111.

The statute only allows them commission "upon the amount of money, or property at the appraised value, which comes into their hands as such."

Commissions on uncollected assets should be disallowed.

Appeal of Vanderford (Supreme Court of Penn. 1888) 12 Atlantic Reporter, 491.

Foote vs. Bruggerhof, 66 Hun's Rep. 406. (21 N. Y. Sup. 509.)

The executor's right to commissions depends on the tatute.

Gaines vs. Reutch, 64 Md. 517.

Where a will provides that the executor should "receive a commission of six per cent upon all moneys collected by him" held not sufficiently comprehensive to entitle the appellant to a commission of six per cent upon the amount of the entire proceeds of the estate.

Ireland vs. Corse, 67 N. Y., 343.

7 Am. & Eng. Enc., 437.

It was proper in such a case as this where a decree is rendered settling the estate, that a distributee having the whole or a part of the estate in his hands, should retain his share and merely receipt for it. It calls "useless the ceremony of paying over with one hand and immediately receiving the same with the other hand."

Williams vs. Mower, 29 S. C., 332 (7 S. E. Rep. 505.)

And why should the complainant, a co-executor, be entitled to commissions on something he was never entitled to receive, as appellant has already abundantly shown? He never did have the right to receive the share of defendant's intestate, and under the tatute is entitled to commissions only on what he would receive and disburse under the decree.

This principle certainly applies to the commissions; the Court would not require the defendant's interest in the estate to be turned over to complainant to be the next instant returned, so the complainant could acquire the right to commissions. The commissions are allowed as compensation for services actually rendered, and which the law required at the hands of the administrator, and it is said that the right to them does not rest on any implied contract.

Gaines vs. Reutch, supra.

The allowance of any commissions whatever to be paid by the defendant on the seventeen twenty-sixths of the estate to be retained by him, was error. If the complainant is allowed commissions on all this es-

tate, why should not the guardian have her commissions on it also? As a matter of fact and law, she was entitled to compensation, and she was entitled to credit for it. As the statute does not fix any amount it devolved upon the master and the Court to fix it.

XXI.

The Court erred in charging against the fund a solicitor's fee of ten per cent of the total amount found against the defendant, thereby charging the defendant and the minor son represented by him, with $2,345.32 of said amount. (See the decree, Record pages 222-223, XI finding of fact, Record, page 222; 15 assignment of error.)

The total amount of property in controversy, as we have shown, did not exceed the nine twenty-sixths of the estate for which Guadalupe P. Harrison was responsible in March, 1888. Her report showed $17,670.61. Add to this $3,383.90, the amount of the items for which the complainant sought to surcharge it, and the total amount of the estate was $21,074.51. Nine twenty-sixths of this was $7,294.95. (Exhibit C to complainant's bill. Record, page 10. Exhibit D to bill. Complainant's exceptions to report, Record, page 14.)

There is not a single word of evidence in the record as to the value of the legal services. The finding is wholly without any evidence to sustain it. The Court does not pretend that there was any evidence as to the value of the legal services rendered. It proceeded upon the theory that the Court did not need any evidence, but could proceed on its own knowledge—Page 234. The Court, however, differed with the master as to the proper amount, thus showing that in the absence of evidence, the amount is very much a matter of caprice. See Court's opinion, page 234.

The authorities referred to by the Court below to sustain its conclusion, with all due respect, we insist, do not sustain it. The allowance was made in ex-parte Plitt, 2 Wall. Jr., 453, wholly out of the fund recovered, and the case is authority only for the proposition that the Court has the power to order it paid out of the fund recovered. The compensation which counsel was to receive had previously been agreed upon. In Trustees vs. Greenough, 105 U. S., 527, the question of the amount was referred and proofs taken and the amount fixed in accordance therewith, and the amount paid out of the fund recovered. The case of Fowler vs. Equitable Trust Co., 141 U. S. ** was a case of foreclosure where the mortgage deed of trust fixed the percentage for attorney's fee and made it a lien on the property.

The Court had no power to tax up an attorney's fee as a part of the costs in this case and order it paid into the clerk's office. The Court had no funds in its hands, and the solicitor was not a party to the suit

by intervening petition or otherwise.

Wolfe vs. Lewis, 19 How. 280.

Allowing an attorney a lien on funds or property in the hands of the Court and ordering it to be paid out of that fund, is a very different thing from taxing up an attorney's fee as part of the costs. There is no statute in New Mexico authorizing it. In the case of Price vs. Garland, 5 New Mexico, 98, the Supreme Court fully reviewed the law of costs, considering the statutes of New Mexico and the common law. The Court said in its opinion:

"The power to tax a sum expended by a successful party as costs, with which to reimburse him for expenditures made against the losing party, has its origin in statutes, and not in common law.

"At first, by the common law, no costs were awarded to either party *eo nomine*. If the plaintiff failed to recover, he was amerced pro falso clamore; if he recovered judgment, the defendant was in misericordia for his unjust detention of the plaintiff's debt, and was not, therefore, punished with the expensa litis under that title. But, this being considered a great hardship, the statute of Gloucester (6 Edw. 1, c. 1) was passed, which gave costs in all cases when the plaintiff recovered damages. This was the origin of cost de incremento; for, when the damages were found by the jury, the judges held themselves obliged to tax the moderate fees of counsel and attorneys that attended the case. "Under the provisions of this statute every court of common law has an established system of costs, which are allowed to the successful party by way of amends for his expense and trouble in prosecuting his suit. It is true, no doubt, and is specially so in this country, that the legal taxed costs are far below the real expenses incurred by the litigant. Yet it is all the law allows as expensa litis." Justice Grier in Day vs. Woodworth, 13 How. 363. See also, Kneass vs.

Bank, 4 Wash. C. C. R. 238.

The courts have no power to award costs simply because they have power or jurisdiction over the subject matter of the suit, or the parties to it. Costs are purely the subject of legislative appointment. Coggill vs. Lawrence, 2 Blatchf. 304. Nor can courts go beyond the provisions of the statute to allow costs. Dedekam vs. Vose, 3 Blatchf. 153. A copy of the record is not a part of the taxable cots of a suit to be recovered by one party against another. Caldwell vs. Jackson, 7 Cranch, 277. Nor can the costs of printing a brief be taxed. Jennings vs. The Perseverance, 3 Dall. 336; Ex-parte Hughes, 144 U. S. 548. The cost of printing the record is now taxed, but this is so by reason of an act of congress. 96 U. S. 594."

Price vs. Garland, 5 New Mexico, 100.

This court has itself held, in the case of "The Baltimore" that attorneys' fees could not be taxed as costs in a case, unless authorized by statute. In discussing the various statutes regulating the taxation of costs in the courts of the United States, the court said:

"Weighed in the light of these several provisions in the Judiciary Act, the conclusion appears to be clear that Congress intended to allow costs to the prevailing party, as incident to the judgment, as most of the regulations referred to would be meaningless upon any other theory. Concede that to be so, still the inquiry arises, by what rules was the taxation to be regulated, and what were the rates of fees to be allowed; to which inquiries there can be but one answer, unless it be assumed that congress intended to leave the whole matter to the discretion of the Court trying the case, which cannot be admitted." In conclusion the Court says: "Attorneys, solicitors and proctors may charge their clients reasonably for their services, in addition to the taxable costs, but nothing can be taxed as cost against the opposite

party, as an incident to the judgment, for their services, except the costs and fees therein described and enumerated."

"The Baltimore," 8 Wall., 377.

It is true that this was an admiralty case, but the principle is applicable to chancery practice as well.

The Probate Court is the proper place for the complainant to get his allowance for expenditures as administrator. He is its officer, there he was appointed and there his accounts are to be settled. Because the District Court takes jurisdiction for an accounting and settlement of an estate, it does not thereby oust the Probate Court of its control over its officers, and its jurisdection to settle and allow his commissions and disbursements. Besides, another suit was pending on appeal from the Probate Court upon the settlement of the accounts of the guardian. The bill alleges that this appeal had not been perfected when the bill was filed. The answer alleges that it had been perfected. If the allegations in the bill are true, the complainant had an ample remedy, by a simple motion in the District Court. He could then have proceeded to have the estate distributed. There was no necessity for this litigation except upon the contention of Guadalupe P. Harrison, deceased, and the defendant that they were entitled to a settlement of both estates, and to a settlement of the guardian's accounts. The suit for a settlement of the estate of Jose L. Perea, Sr., had already been brought and was pending when the minor Jose L. Perea, Segundo, died.

The rule of the court in relation to appeals from

the District Court at that time was as follows: "In causes originating in Probate Courts or Justices' Courts, and brought into the District Court by appeal or certiorari, if the appellant or plaintiff in error shall not procure the cause to be docketed on or before the third day of the term at which the return shall be made, the appellee or defendant in error may, on motion, have the cause docketed and the appeal or certiorari dismissed, or, at his election, he may have the judgment below affirmed, and judgment rendered for the same, with costs, against the appellant or plaintiff in error and his sureties."

Rule 14 of Sup. Ct. of N. M., for District Courts, p. 17 (1893).

XXII.

The Probate Court, not the District Court, is the Court in which complainant should secure allowance of commissions and disbursements, and there no such allowance should be made except upon evidence and settled principles of law:

As to the allowance of the costs of a guardian's accounting in the Court of New York, it is said:

"It is necessary, in order to sustain such an allowance that it should appear to be just and reasonable, and, until the evidence upon which the allowance is made is spread upon the record, we are unable to determine as to whether the Court had any legal proof upon which to act, or whether it acted entirely upon its own judgment. In cases of this description, the amount of the indemnity is not in the discretion of the court, but the judgment of the Court must be founded upon the legal proof, and where there is no legal proof of the value of the services for which this allowance is made it cannot be sustained."

In re Carman, 51 Hun's Rep. 639 (4 N. Y. Supplement 690).

In a case involving the settlement of a guardian's accounts, the Supreme Court of Illinois said:

"The general rule is that the cestui que trust has a right to demand a full investigation and explanation of the accounts, but the trustee is entitled to be reimbursed for all his costs and expenses in accounting. If both parties are materially in fault, the expenses should be borne equally. Smith v. Kennard, 38 Ala., 695; Woodruff v. Snedecor, 68, Ala., 437; Sherman v. Angel, 2 Hill, Eq. 26; Moses v. Moses, 50 Ga. 9; Blake v. Pegram, 109 Mass. 558. Where, however, the trustee has acted in good faith, and his accounts are contested, and it becomes necessary he should have the assistance of legal counsel, and where the various steps in the litigation over his accounts result in successive diminutions of the balance against him, he is entitled to his costs and expenses, even though some items of his accounts are not allowed. Yoder's Appeal, 45 Pa. St. 394; McElhenny's Appeal, 46 Pa. St. 348; Smith's Apppeal, 47 Pa. St. 425; Bendall's Distributees v. Bendall's Adm'r, 24 Ala. 305; Pinckard's Distributees v. Pinckard's Adm'rs, Id 250; Ashley v. Martin, 50 Ala., 537."

Kingsbury vs. Powers, 131 Ill. 182 (22 N. E. Rep., 484).

7 Am. & Eng. Enc., 435.

Also see exhaustive note on subject of allowance of attorneys' fees to case of Lucich v. Medin, 93 Am. Dec. 396.

Where a litigation is equally the fault of both parties, one-half may be paid out of the estate and the other must be paid by the executor or administrator.

Smith v. Kennard, 38 Ala. 695.

An administrator will not be allowed an attorney's fee where the litigation is entirely his own fault. Pearson v. Doningglear, 32 Id. 227, and other cases cited in note to 93 Am. Dec., supra.

XXIII.

It seems to appellant unnecessary to consider each assignment of error separately. The principles we have been discussing apply to all of them, and we think that we have considered all the principles of law bearing on them. If appellant is right in this contention, the Court took jurisdiction and tried the case on a wrong theory as to the rights and relations of the parties from beginning to end; and also made its findings of fact upon a wrong theory. Many of these so-called findings of fact are finding of law, and this Court will so treat them. We respectfully submit that the decree should be reversed and the cause remanded, with proper instructions to the Court below.

WM. B. CHILDERS,
Solicitor for Plaintiff.